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OGC 62-0083

15 January 1962

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Legal Basis for Cold-War Activities

1. This memorandum is for information.

2. I discussed with Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, Department of Justice, the points raised by Senator Eugene J. McCarthy concerning the juridical or constitutional right of CIA to carry out covert activities directed towards the imposition of a particular line of political thought on a foreign country. The President, with his responsibility for the conduct of foreign relations, as Commander in Chief of the Armed Forces, and with the powers inherent in the Presidency, has authority to take such executive actions as he deems appropriate to protect the national interest which are not barred by the Constitution or other valid law of the land.

3. There are no general prohibitions in law on cold-war activities of a covert nature, although there are laws limiting such specific acts as mounting military expeditions within this country against a foreign sovereign. It would appear, therefore, that cold-war activities not involving an act of war and not within such legal limitations would be within the executive prerogative.

[redacted]

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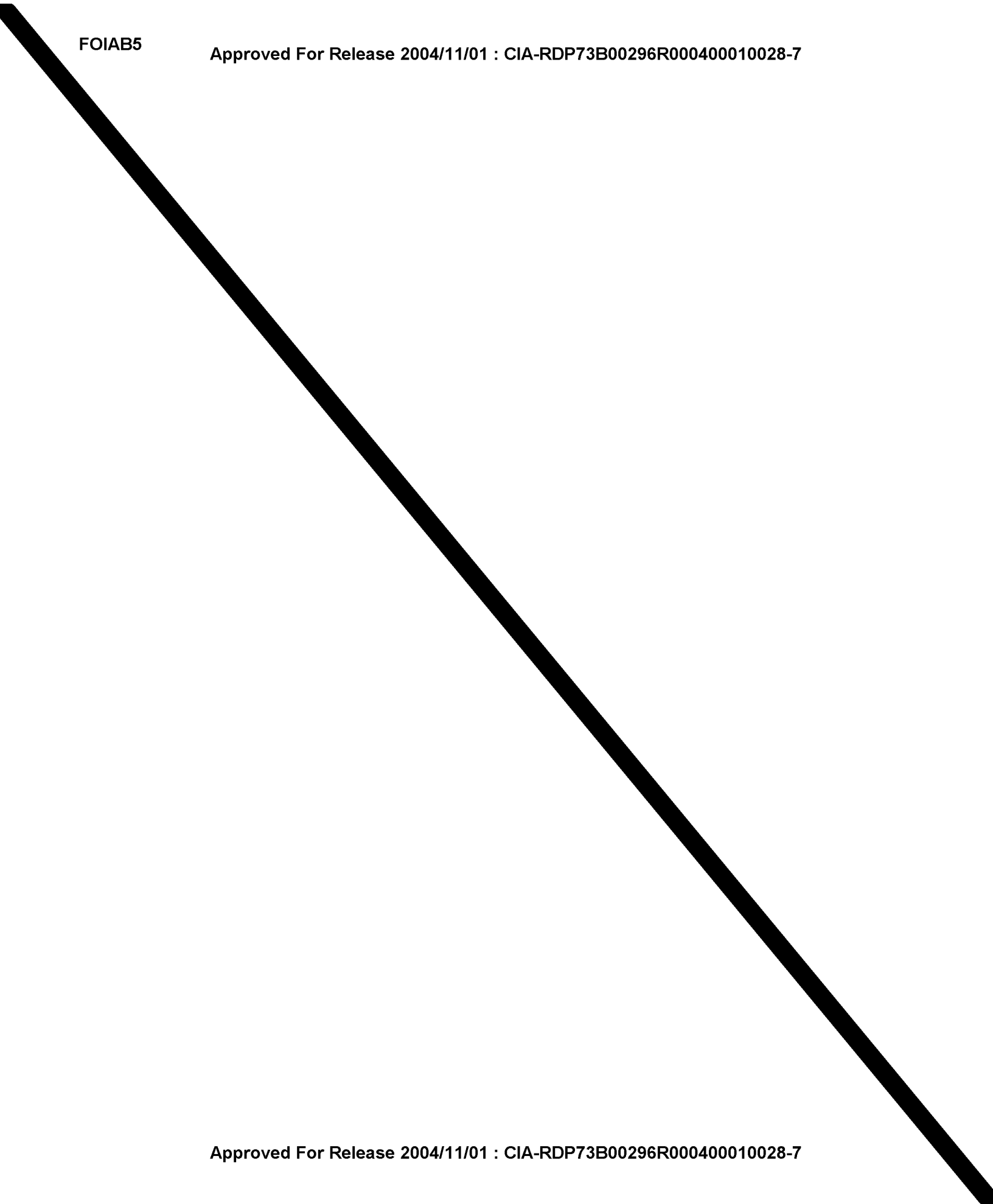

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7. It can be said the Congress as a whole knows that money is appropriated to CIA and knows that generally a portion of it goes for clandestine activities. To this extent, we can say that we have congressional approval for those activities but we cannot say that we have general congressional approval for any specific activity as the knowledge is restricted to the group specified above and occasional other congressmen briefed for specific purposes. It is for the Executive Branch to determine the nature and extent of these activities and how they should be conducted. CIA has been directed by the National Security Council, of which the President is ex officio Chairman, to undertake such activities and the Congress has provided funds to CIA for their performance. Additional statutory authority is unnecessary and, in view of the clandestine nature of the activities, undesirable.

s/ Lawrence R. Houston

LAWRENCE R. HOUSTON
General Counsel

CGC:LRH:jeb

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Memorandum Re:

Constitutional and Legal Basis for So-Called Covert Activities of the Central Intelligence Agency.

This memorandum will discuss the constitutional and legal authority for the Central Intelligence Agency to engage in covert activities directed towards the imposition of a particular line of political thought on a foreign country. It is understood that certain cold-war activities of a covert nature, such as "black" propaganda, commando-type raids, sabotage, and support of guerrilla activities, have been engaged in by CIA almost from its inception, pursuant to an express directive of the National Security Council, and that the Congress has repeatedly appropriated funds for the support of such activities.

I. Constitutional Powers of the President.

"As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." Burnet v. Brooks, 288 U.S. 378, 396. These powers do not "depend upon the affirmative grants of the Constitution," but are "necessary concomitants of nationality." United States v. Curtiss-Wright Corp., 299 U.S. 304, 318.

"In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty" the constitutional powers of the President are broad. 30 O.A.G. 291, 292. "The very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress", although, like all governmental powers, it must be exercised in subordination to any applicable provisions of the Constitution. United States v. Curtiss-Wright Corp., supra, at p. 320. His duty to take care that the laws be faithfully executed extends not merely to express acts of Congress, but to the enforcement of "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all of the protection implied by the nature of the government under the Constitution." In Re Neagle, 135 U.S. 1, 64. (1890).

Examples of the exercise of these broad powers are numerous and varied. Their scope may be illustrated by the following: The President may take such action as may, in his judgment, be appropriate, including the use of force, to protect American citizens and property abroad. Durand v. Hollins, Fed. Cas. No. 4186 (C.C.S.D.N.Y. (1860)); In Re Neagle, Supra,

135 U.S. at 64; Hamilton v. M'Claughry, 136 Fed. 445, 449-50 (D. Kansas, 1905); II Hackworth, Digest of International Law, 327-334; VI Id., 464-5. Notwithstanding the exclusive power of Congress to declare war, the President may repel armed attack and "meet force with force." Prize Cases, 2 Black 635, 668 (1862). He may impose restrictions on the operation of domestic radio stations which he deems necessary to prevent unneutral acts which may endanger our relations with foreign countries. 30 O.A.G. 291.

Congress' grants of powers to executive agencies in areas relating to the conduct of foreign relations and preservation of the national security from external threats are generally couched in terms which neither limit the powers of the President nor restrict his discretion in the choice of the agency through which he will exercise these powers. Thus, in establishing a Department of State in 1799, Congress directed that the Secretary should perform duties relating to "such . . . matters respecting foreign affairs as the President of the United States shall assign to the Department", and should "conduct the business of the department in such manner as the President shall direct." 1 Stat. 28; R.S. § 202, 5 U.S.C. 156.

More recently, in establishing the National Security Council, Congress gave it the function of advising the President "with respect to the integration of domestic, foreign, and military policies relating to the national security." 50 U.S.C. 402 (a).

From the beginning of our history as a nation, it has been recognized and accepted that the conduct of foreign affairs on occasion requires the use of covert activities, which might be of a quasi-military nature. See, e.g., the acts of July 1, 1790, 1 Stat. 128, and March 1, 1810, sec. 3, 2 Stat. 609. In a message to the House of Representatives declining to furnish an account of payments made for contingent expenses of foreign intercourse, President Polk reviewed that practice and stated:

> "The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity." 1/

1/ President Polk continued:

> "Some governmentshave very large amounts at their disposal, and have made vastly greater expenditures than the small amounts which have from time to time been accounted for on President's certificates. In no nation in the application of such sums ever made

Footnote 1/ continued:

> public. In time of war or impending danger the situation of the country may make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be divulged. So it may often become necessary to incur an expenditure for an object highly useful to the country; for example, the conclusion of a treaty with a barbarian power whose customs require on such occasions the use of presents. But this object might be altogether defeated by the intrigues of other powers if our purposes were to be made known by the exhibition of the original papers and vouchers to the accounting officers of the Treasury. It would be easy to specify other cases other cases (sic) which may occur in the history of a great nation, in its intercourse with other nations, wherein it might become absolutely necessary to incur expenditures for objects which could never be accomplished if it were suspected in advance that the items of expenditure and the agencies employed would be made public." 4 Richardson, Messages and Papers of Presidents, 431, 435 (April 20, 1846)

Compare also Stuart, American Diplomatic and Consular Practice (1952) p. 196, (commenting on prevailing diplomatic practice of all countries), "actual cases of interference in the internal affairs of states to which the envoys are accredited are very numerous."

An early example of such a secret operation is afforded by the Lewis and Clark expedition of 1803. That expedition was authorized prior to the Louisiana Purchase by a statute providing

> "That the sum of two thousand five hundred dollars be, and the same is hereby appropriated for the purpose of extending the external commerce of the United States (2 Stat. 206)."

Congress used this cryptic language at the request of President Jefferson because, in the words of a present-day judge, the "expedition, military in character, would enter into lands owned by a foreign nation with which the United States was at peace and . . . the utmost secrecy had to be observed." 2/ First Trust Co. of St. Paul v. Minnesota Historical Soc., 146 F. Supp. 652, 656 (D.C. Minn. (1956)), aff'd sub. nom. United States v. First Trust Co. of St. Paul, 251 F. 2d 686 (C.A. 8).

2/ In his message to the Congress, President Jefferson stated: "* * * The appropriation of $2,500 ' for the purpose of extending the external commerce of the United States,' while understood and considered by the Executive as giving the legislative sanction, would cover the undertaking from notice and prevent the obstructions which interested individuals might otherwise previously prepare in its way." (1 Richardson, Message and Papers of the Presidents, 352 at 354.)

Under modern conditions of "cold war", the President can properly regard the conduct of covert activities such as are described at the opening of this memorandum as necessary to the effective and successful conduct of foreign relations and the protection of the national security. When the United States is attacked from without or within, the President may "meet force with force", Prize Cases, supra, In waging a world wide contest to strengthen the free nations and contain the Communist nations, and thereby to preserve the existence of the United States, the President should be deemed to have comparable authority to meet covert activities with covert activities if he deems such action necessary and consistent with our national objectives. As Charles Evans Hughes said in another context, "Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States." War Powers Under the Constitution, 42 A.B.A. Rep. 232 (1917). Just as "the power to wage war is the power to wage war successfully," id. 238, so the power of the President to conduct foreign relations should be deemed to be the power to conduct foreign relations successfully, by any means necessary to combat the measures taken by the Communist bloc, including both open and covert measures.

The exclusive power of Congress to declare war has been held not to prevent use by the President of force short of war to protect American citizens and property abroad. A fortiori, it does not prevent his use of force short of war for other purposes which he deems necessary to our national survival. In either case the magnitude and possible grave international consequences of a particular action may be such as to render it desirable for the President to consult with, or obtain the "approval or ratification of," the Congress if circumstances permit such action. But the necessity for obtaining such approval does not depend on whether the action is overt or covert.

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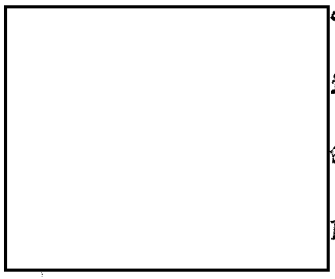

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Remarks: Jack: Attached are Larry's memorandum of 15 January 1962 and a memorandum of 17 January 1962 prepared by the Office of Legislative Counsel, Department of Justice. [redacted] the basic thrust is the constitutional power of the President and that no statutory authorization is required. After you have digested these, we should consider what to do next [redacted]

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John S. Warner

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